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No. ____

Supreme Court, U.S.
FILED

091447 MAR 29 2010

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Miller Auto Sales, Inc., a Virginia corporation,

Petitioner,

v.

Volkswagen of America, Inc., a New Jersey corporation,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Virginia Supreme Court's decision to invalidate Virginia Code § 46.2-1569(7) as impermissibly vague on the basis of a hypothetical, rather than actual set of facts contradicts this Court's holding in *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982).

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies.

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PETITION FOR WRIT OF CERTIORARI

Miller Auto Sales, Inc. ("Miller Auto"), respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia .

OPINIONS BELOW

The opinion of the Supreme Court of Virginia (reprinted at App. A-1)[1] is reported as *Volkswagen of America, Inc. v. Smit*, 279 Va. 327, 689 S.E.2d 679 (2010) ("*VWoA v. Smit*"). This opinion reversed the decision of the Virginia Court of Appeals (reprinted at App. A-48), reported at 52 Va. App. 751, 667 S.E.2d 817 (2008). The unpublished order of the Circuit Court, City of Richmond is reprinted at App. 106.

JURISDICTION

The Virginia Supreme Court's final judgment was entered on February 25, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

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[1] References to the Appendix contained in this Petition for Writ of Certiorari will be denoted "(App ___)."

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War on public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

2. The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV § 1.

3. Virginia Code § 46.2-1569(7) provides, in pertinent part:

> Notwithstanding the terms of any franchise agreement, it shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or their representatives:
>
> ...
>
> (7) To fail to ship monthly to any dealer, if ordered by the dealer, the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle production or importation currently being achieved nationally by each make, series, and model covered under the franchise. Upon the written request of any dealer holding its sales or sales and service franchise, the manufacturer or distributor shall disclose to the dealer in writing the basis upon which new motor vehicles are allocated, scheduled, and delivered to the dealers of the same line-make. In the event that allocation is at issue in a request for a hearing, the dealer may demand the Commissioner to direct that the manufacturer or distributor provide to the dealer, within thirty days of such demand, all records of sales and all records of distribution of all motor

vehicles to the same line-make dealers who compete with the dealer requesting the hearing.

STATEMENT OF THE CASE

This case raises an important issue as to the proper application of this Court's Due Process jurisprudence to an as-applied challenge of a state statute's validity. In particular, it presents the question of whether resolving an as-applied challenge to a statute on the basis of a hypothetical set of facts violates this Court's holding in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). The Virginia Supreme Court used an improper Due Process analysis to invalidate a statute aimed at protecting small businesses from unfair economic coercion.

Although the Virginia Supreme Court purported to conduct an as-applied analysis, it based its decision on a Due Process test of its own construction, then applied facts and situations outside the scope of the defendant's conduct. This decision represents the propensity for courts to employ reasoning reserved for facial challenges to as-applied challenges. This threatens the intelligibility of the as-applied doctrine as a distinct categorical inquiry. In light of the tendency to misapply the vagueness test in an as-applied challenge, these issues merit further guidance by this Court.

A. Virginia Code Section 46.2-1569(7)

Due to the asymmetries of bargaining power present between large automobile manufacturers and smaller dealers, Virginia law regulates the activities of motor vehicle distributors. Volkswagen of America, Inc.'s ("Volkswagen") operations are subject to the provisions of the Virginia Motor Vehicle Dealer Franchise Act (the "Act"), which specifically regulates motor dealership franchise relationships. Va. Code Ann. § 46.2-1500 *et seq.* The Act is one example of numerous similar statutes that seek to ensure the equitable treatment of small dealerships like Miller Auto in their interaction with much larger global corporations like Volkswagen. Congress and this Court have accurately described dealerships as the "economic captives" of manufacturers.

> The substantial investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute toward making the dealer an easy prey for domination by the factory. On the other hand, from the standpoint of the automobile manufacturer, any single dealer is expendable.

New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 100 n. 4 (1978) (*citing* S. Rep. No. 2073, 84th

Cong., 2d Sess., 2 (1956); S. MaCauley, Law and the Balance of Power: The Automobile Manufacturers and Their Dealers (1966)).

At issue in this case is Volkswagen's compliance with Va. Code Ann. § 46.2-1569(7) (the "Statute"). The Statute, which is administered by the Commissioner of the Virginia Department of Motor Vehicles (the "Commissioner") provides that "it shall be unlawful for any manufacturer...:

> (7) To fail to ship monthly to any dealer, if ordered by the dealer, the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle production or importation currently being achieved nationally by each make, series, and model covered under the franchise.

Va Code Ann. § 46.2-1569(7). This section fully harmonizes with the underlying policy objectives of the Act and other similar state and federal statutes intended to reduce coercive practices. The Statute seeks to prevent a manufacturer from abusing or coercing a dealer by improperly restricting vehicle shipments. It, therefore, requires the manufacturer to justify its allocations and shipments by producing records related to its "distribution of all motor vehicles" to competing dealerships. *Id.*

B. The Vehicle Distribution Litigation

This case began approximately twelve years ago with a proceeding filed before the Commission of the Virginia Department of Motor Vehicles in February 1998. Since that time, it has proceeded through two appeals to the Circuit Court of the City of Richmond, two appeals to the Court of Appeals of Virginia, two appeals to the Supreme Court of Virginia, and now this Petition for a Writ of Certiorari before this Court.

Volkswagen is one of the world's largest motor vehicle importers and distributors. With a network of approximately 600 dealers nationwide and 17 dealers in Commonwealth of Virginia, Volkswagen imports a fixed number of vehicles from its German parent company each year. (App. A-49). In 1997 and 1998, Volkswagen introduced a number of popular new models into the U.S. market, including the Passat and the New Beetle. *Id.* To allocate these sought-after vehicles among its dealers, Volkswagen utilized a complex formula based on sales and other data. (App. A-50). Because Volkswagen relied on this allocation formula rather than orders received from dealers, smaller dealers often had difficulty obtaining even the minimum number of vehicles necessary to meet Volkswagen's required inventory standards. *Id.*

Miller Auto is a Volkswagen dealer located in Winchester, Virginia. In January 1998, Miller Auto was the smallest dealership (by vehicle sales volume) in Volkswagen's sales district 32 (which

includes large Washington-Metro dealers), entitled under Volkswagen's then-current vehicle allocation formula to less than one percent (.98%) of the automobiles distributed in that district. (App. A-49-50). Because vehicle allocations were often accomplished on a model-by-model basis, it was rare for enough vehicles to be allocated at one time such that Miller Auto (entitled to 0.98%) would actually receive a single vehicle.[2] Since Volkswagen's dealers were not privy to the methods used by Volkswagen to allocate vehicles within its sales network, dealers such as Miller Auto were left simply to wonder why they were receiving inadequate or no vehicles to meet required sales quotas. (*See* App. A-50-52).

Frustrated by inadequate shipments of Passats and Beetles, in February 1998 Miller Auto commenced an action in the Virginia Department of Motor Vehicles (the "Virginia DMV"), under Va. Code Ann. § 46.2-1569(7) challenging the shipments of vehicles that it received from Volkswagen. Specifically, Miller Auto asserted that Volkswagen's shipments of vehicles violated the Statute because they included an insufficient number of vehicles for Miller Auto to achieve the sales that Volkswagen

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[2] Although unknown to dealers, including Miller Auto, at the time, the Volkswagen vehicle allocation formula automatically rounded fractional vehicle shares up or down to the nearest whole number. (App. A-52). Thus, if 50 vehicles were being allocated to district 32's 12 Volkswagen dealers, the formula would round Miller Auto's 0.98 percent "entitlement" of 0.49 vehicles down to zero vehicles. Miller Auto's small share of the district 32 "pie" meant that it rarely qualified to receive a car, based on the system designed by Volkswagen. *Id.*

required. After a formal administrative hearing in 1999, the Commissioner determined that Volkswagen's vehicle allocation methodology violated the Statute. (App. A-51).

Volkswagen appealed the Commissioner's decision to the Circuit Court for the City of Richmond, arguing that the Commissioner had misinterpreted the Statute as regulating allocation methodologies (versus shipment numbers), and that the Statute was unconstitutional in two respects. First, Volkswagen argued that the statute is unconstitutionally vague in violation of the Due Process clause of the U.S. and Virginia Constitutions, because it fails to provide fair warning of the conduct prohibited and delegates unfettered discretion to the Commissioner. (App. A-52). Second, Volkswagen argued that the statute violates the Dormant Commerce Clause of the U.S. Constitution because the practical effect is to regulate commerce outside the borders of the Commonwealth of Virginia. (App. A-53).

On appeal, both the Circuit Court for the City of Richmond and the Court of Appeals of Virginia affirmed the Commissioner's decision, rejecting Volkswagen's constitutional claims and holding that there was substantial evidence in the record to support the conclusion that Volkswagen's vehicle allocation methodology was contrary to the Statute. (App. A-2). Subsequently, the Virginia Supreme Court reversed, holding that the Commissioner exceeded his statutory authority because the Statute regulates shipment numbers rather than vehicle allocation methodologies. The Supreme Court

remanded the case to the Commissioner with instructions to first make specific factual findings regarding Volkswagen's national importation numbers and the actual monthly shipments received by Miller Auto; and second, to determine whether the actual monthly shipments received by Miller Auto were equitably related to Volkswagen's national importation numbers. (App. A-2).

In a second administrative hearing, the Commissioner determined that Volkswagen's shipment of vehicles during certain months in 1997 and 1998 violated the Statute. The Circuit Court of the City of Richmond affirmed the Commissioner's decision on all points as did the Virginia Court of Appeals. On April 14, 2009, the Supreme Court of Virginia granted, in part, Volkswagen's Petition for Appeal, limited to the two Assignments of Error articulated above challenging the constitutionality of the statute. (App. A-2-3).

C. The Virginia Supreme Court's Decision

Divided 4-3, the Virginia Supreme Court in *Volkswagen of America, Inc. v. Smit* ("*VWoA v. Smit*") held that Va. Code § 46.2-1569(7) was impermissibly vague and thus violated Volkswagen's Due Process right to notice under the Constitution (App. A-18). The Virginia Supreme Court framed the question as follows: did the statute give Volkswagen notice it was required to ship at least one Passatt and at least one Beetle to Miller Auto, if it were capable? Citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000), the Virginia Court noted that there are independent ways in which a statute can be

impermissibly vague: first, "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits"; and second, if it authorizes arbitrary and discriminatory enforcement. (App. A-11).

As to the first issue, the Virginia Court concluded that the statutory language was too vague to provide Volkswagen reasonable notice that its decision not to deliver any of the models Miller Auto requested (New Beetles and Passats) would constitute a violation. (App. A-14). The Court also concluded that the lack of standards in the statute meant that the DMV Commissioner's ruling, though based on "simple mathematics", was arbitrary. (App. A-17).

To support the conclusion that the statute authorizes an excessive breadth of discretion by the Commissioner, the Virginia Court primarily relied upon *Chapel v. Commonwealth*, 197 Va. 406, 89 S.E.2d 337 (1955). (App. A-15). That case involved the statutory delegation of discretionary authority to grant licenses and assess penalties to the State Dry Cleaners Board. 197 Va. 406, 408, 89 S.E. 337, 338-39. Notably, this case did *not* involve a due process vagueness challenge, but rather a statement of the Non-Delegation Doctrine. *Id.* From the reasoning in *Chapel*, the Virginia Supreme Court in *VWoA v. Smit* concluded that the fair notice requirement of due process is not satisfied when "the public cannot determine what the law prohibits or the standard to which they must conform from either the language of the statute or a properly promulgated regulation or other official guidance...." (App. A-16).

Three justices dissented in *VWoA v. Smit*, joining an opinion written by Justice Kinser. The dissent begins by framing the question in a different way, more closely tied to the language of the Statute: the question, Justice Kinser wrote, "is not whether Volkswagen knew it was prohibited from sending Miller Auto zero Passats and zero New Beetles simply because it had imported enough to send each of its dealers at least one of both models." (App. A-24). Rather, the proper question is whether Volkswagen had fair notice that its decision to send zero Passats and Beetles to Miller Auto was *not equitably related to* the total number of those vehicles it actually imported. *Id.* Viewed in this light, the statute requires a distributor simply to consider what allocation of new vehicles is equitable in relation to the total number of produced or imported vehicles.

The dissent primarily criticized the majority's as-applied analysis, as being contrary to this Court's precedent, particularly *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). (App. A-25-35). First, the dissent argued that the Statute clearly proscribed Volkswagen's conduct in its case, such that Volkswagen is estopped from complaining about discriminatory enforcement in regard to the conduct of others. (App. A-30, citing *Hoffman*, 455 U.S. at 495). In an "as applied" challenge, the standard is not, as the majority posited, whether *the public* can determine what the law prohibits, but rather whether the party asserting the challenge knew, given the facts of its

case, whether there was some basis on which the law proscribed its conduct. (App. A-31-32).

Finally, Justice Kinser writes that the Virginia court's majority, in ignoring the total number of vehicles that Volkswagen imported and instead focusing on whether Volkswagen was "otherwise capable of" shipping at least one Passat and Beetle, constructed a hypothetical situation that is inappropriate for analysis in an "as applied" challenge. (App. A-35). This approach conflicts with the standard "as applied" test, as it fails to restrict analysis to the complainant's actual conduct. *Cf. Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

REASONS FOR GRANTING THE PETITION

The Supreme Court of Virginia disregarded and contradicted this Court's Due Process jurisprudence in deciding *VWoA v. Smit*. The Virginia court, purporting to conduct an as-applied analysis for vagueness, instead invalidated a portion of the Virginia Motor Vehicle Dealer Franchise Act on the basis of a hypothetical. Following this Court's precedent from *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) ("*Hoffman*"), the Virginia Court should have examined the Statute's application to Volkswagen's actual conduct in this case. Instead, the Virginia Court relied on a construction of the Non-Delegation Doctrine which is inappropriate because the Statute clearly applied to Volkswagen's conduct.

This case presents a wrong "of constitutional dimension," appropriate for resolution by this Court. *Smith v. Phillips*, 455 U.S. 209, 221 (1982). The case is an opportunity for this Court to clarify for federal and state courts the proper judicial test for statutory vagueness under Due Process Clauses of the Constitution.

I. THE VIRGINIA SUPREME COURT CONTRADICTED THIS COURT'S DUE PROCESS JURISPRUDENCE, AS IT INVALIDATED THE STATUTE ON THE BASIS OF A HYPOTHETICAL.

A. This Court Has Repeatedly Held That As-applied Vagueness Challenges Are to Be Decided By Examining a Party's Actual Conduct, Not a Hypothetical.

The Supreme Court of Virginia's ruling that the Statute as applied to the facts of this case is unconstitutionally vague directly contradicts this Court's Due Process jurisprudence. This Court's prior decisions require courts, when deciding an as-applied challenge, to examine the complainant's conduct before analyzing other hypothetical applications of the law. Instead of evaluating the Statute as applied to Volkswagen's actual conduct in this case, the Virginia Court constructed a hypothetical scenario and applied the Statute's provision to that scenario.

In *VWoA v. Smit*, the Supreme Court of Virginia found that "Volkswagen could not reasonably have understood from the language of the

statute that its failure to ship any newly introduced Passats and New Beetles to Miller Auto would violate Code § 46.2-1569(7)." (App. A-18). In making that determination, the Virginia Court deviated from this Court's test for as-applied vagueness challenges. A statute can be impermissibly vague for two reasons. "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

Vagueness challenges to statutes not involving First Amendment concerns are examined in light of the facts and circumstances of the case at hand and are decided on an as-applied basis. *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988); *United States v. Powell*, 423 U.S. 87, 92-93 (1975); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963). This Court has stated that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct *before* analyzing other hypothetical situations of the law." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (emphasis added); *Parker v. Levy*, 417 U.S. 733, 756 (1975) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness"). This Court has repeatedly demonstrated its disapproval of courts that engage in speculation or supposition with respect to as-applied vagueness challenges.

> It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. 'It would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.'

Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (quoting *United States v. Raines*, 362 U.S. 17, 21 (1960)). "For this reason, '[a]s-applied challenges are the basic building blocks of constitutional adjudication.'" *Gonzales, 550 U.S.* at 168 (2007) (quoting Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1328 (2000)). This Court has recently warned of the specific dangers of performing a hypothetical analysis in resolving constitutional questions of vagueness.

> In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases.
>
> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records.

Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449-50 (2008).

B. The Virginia Court Improperly Evaluated the Statute Against a Hypothetical.

The Supreme Court of Virginia contradicted this Court's holding in *Hoffman* that a vagueness challenge necessarily fails if the challenger engages in conduct which is "clearly proscribed." *Hoffman*, 455 U.S. at 495. *Hoffman* requires that the evaluation of whether a statute is vague as applied to a litigant's conduct must be made with respect to the litigant's actual conduct, and not with respect to hypothetical situations at the periphery of the statute's scope. *Id.* Although a statute may contain certain ambiguities, it is not impermissibly vague as long as the standard is sufficiently clear to cover the conduct at question. *See Id.* at 502. Although the Supreme Court of Virginia purported to conduct an as-applied analysis, it actually failed to do so because it did not examine the statute "in light of the facts of the case at hand." *Maynard*, 486 U.S. at 361. Rather, it constructed a new set of facts to conclude that the statute was unlawfully vague, and thus slipped into a hypothetical analysis.

The pertinent section of the Statute imposes a clear requirement on automobile distributors – to ship to dealers a number of new models that are equitably related to total national production or

distribution.[3] Under this Court's precedent, the appropriate inquiry for an as-applied challenge to the Statute required the Virginia Supreme Court to ask two straightforward questions. First, did the Statute give fair warning to Volkswagen that its shipment of new vehicles to Miller Auto had to be "equitably related" to its total nationwide distribution? And second, as applied in this case, did the Statute authorize arbitrary or discriminatory enforcement by the Commissioner of the Virginia Department of Motor Vehicles? However, the Virginia Supreme Court failed to ask these two questions. Rather, the Court disregarded the clear statutory language, instead asking whether the Statute gave notice to Volkswagen that it was prohibited from failing to ship at least one vehicle of each model to Miller Auto "if it were otherwise capable of doing so" or "without regard to any other

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[3] Notwithstanding the terms of any franchise agreement, it shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or their representatives:

> ....
>
> (7) To fail to ship monthly to any dealer, if ordered by the dealer, the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle production or importation currently being achieved nationally by each make, series, and model covered under the franchise.

Va. Code § 46.2-1569(7).

factors."[4] In applying that test, the majority constructed a hypothetical situation, applied a legal test the Statute does not contain, and failed to examine the actual facts of the case.

The Virginia Supreme Court's hypothetical, unlike the actual facts of the case, focused only on whether Volkswagen imported enough Passats and New Beetles during the time period to give its 600 dealer franchises at least one vehicle of each model. (App. A-17). This is not what the Statute requires. The Statute simply required Volkswagen to ship, if ordered, the number of model year 1998 Passats and New Beetles needed by Miller Auto to receive a percentage of new vehicle sales of such vehicles that was "equitably related" to the total number of 1998

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[4] In making its vagueness determination, the Virginia court stated:

> Neither the statute nor the administrative regulation or guidance promulgated by the Commissioner provided Volkswagen with notice that if the number of vehicles available in a given month was equal to or greater than the number of dealers making requests, it was prohibited from failing to deliver Miller Auto at least one of each model of vehicle requested without regard to any other factors that might impact the determination of the number of vehicles the dealer would otherwise be entitled to receive.
>
> ....
>
> The issue before this court is...whether Code § 46.2-1569(7) provided Volkswagen with adequate notice that the statute prohibited Volkswagen from failing to ship at least one of each model to Miller Auto if it were otherwise capable of doing so. (App. A-17).

Passats and New Beetles that Volkswagen imported nationally. (*See* App. A-20). By focusing instead on whether Volkswagen was "otherwise capable of" shipping at least one Passat and one New Beetle, the Supreme Court of Virginia asked the wrong question. The Virginia Supreme Court also failed to apply the actual facts of the case, which were that Miller Auto received zero 1998 Passats and New Beetles during the relevant months as ordered. Thus, the Virginia Court failed to conduct an as-applied analysis as required by this Court's jurisprudence.

II. THE STATUTE WAS NOT UNCONSTITUTIONALLY VAGUE, AS VOLKSWAGEN ENGAGED IN CONDUCT WHICH IS "CLEARLY PROSCRIBED."

In *Hoffman*, a corperation in the business of selling records, smoking accessories, novelty devices, and jewelry brought an action in federal court challenging the constitutionality of a local village ordinance regulating the sale of drug paraphernalia. *Hoffman*, 455 U.S. at 491-92. The lawsuit alleged that the ordinance was impermissibly overbroad and vague because it required a business to obtain a license if it sold any items which were "designed or marketed for use with illegal cannabis or drugs." *Id.* at 492. A series of licensing guidelines prepared by the village's attorney indicated that the sale of "paper," "roach clips," "pipes," and "paraphernalia" made a business subject to licensure under the ordinance. *Id.* The district court upheld the constitutionality of the ordinance and ruled in favor of the village. *Id.* at 493-94. On appeal, the Seventh

Circuit reversed and found that the ordinance was vague in certain applications and that the subjective nature of the ordinance created a danger of arbitrary and discretionary enforcement "against those with alternative lifestyles." *Id.* at 494.

This Court upheld the constitutionality of the ordinance and reversed. *Id.* at 491. The Court stated that a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Id.* at 495. The Court acknowledged "[t]he ordinance and guidelines do contain ambiguities." *Id.* at 502. "Nevertheless, the 'designed for use' standard is sufficiently clear to cover at least some of the items that [the corporation] sold." *Id.* The Court concluded that the corporation had fair notice that failure to obtain a license would violate the ordinance, and rejected its challenge to the statute. *Id.* at 504-05.

In this case, the Statute sufficiently warned Volkswagen that it was required to treat its smallest dealers fairly and equitably in determining vehicle shipments. Va. Code Ann. § 46.2-1569(7). As in *Hoffman*, the text of the Statute gives more than adequate notice to manufacturers that if they choose to ship zero vehicles when ordered by a Virginia dealer, they will have to justify such a decision by showing that their national importation numbers were so small that the allocation decision was

equitable under the circumstances. *Id.* ("[I]t shall be unlawful ... [t]o *fail to ship* ...") (emphasis added).

Volkswagen simply failed to provide sufficient evidence to the Commissioner that its allocation decision could be justified in light of the vehicles available to it. Volkswagen's conduct clearly violated the requirements of the Statute. Volkswagen imported over 18,000 new vehicles of the Passat and New Beetle models, and sent zero to Miller Auto. (App. A-61). No reasonable interpretation of the Statute could support the argument that shipment of zero vehicles to one dealer is "equitably related to total new vehicle production or importation" nationally. Va. Code § 46.2-1569(7). Because Volkswagen's conduct in this case was clearly proscribed by the statute, it is estopped from complaining about the application of the Statute to the behavior of any others, and estopped from challenging the Statute on the basis of a hypothetical set of facts. *Hoffman*, 455 U.S. at 495. Ultimately, Volkswagen failed to provide any evidence that the Statute is impermissibly vague and, therefore, failed to meet its burden of demonstrating a constitutional defect in the Statute.

III. THE VIRGINIA COURT'S RELIANCE ON THE NON-DELEGATION DOCTRINE FURTHER CONTRADICTS THE HOLDING OF *HOFFMAN*.

A. A Non-Delegation Doctrine Analysis Was Inappropriate in this Case.

The Virginia Court's construction of the Non-Delegation Doctrine, from two Virginia cases, *Chapel v. Commonwealth of Virginia*, 197 Va. 406, 89 S.E.2d 337 (1955) ("*Chapel*"), and *City of Waynesboro v. Keiser*, 213 Va. 229, 191 S.E.2d 196 (1972) ("*Keiser*"), also contradicts this Court's holding in *Hoffman*. In support of its decision, the Virginia Court relied upon *Chapel* and *Keiser* for the proposition that "[a] statute ... which delegates discretionary authority to an administrative officer to determine its application does not satisfy due process if it lacks standards which are sufficiently clear to guide the officer and inform those subject to his jurisdiction, of how that discretion is to be exercised." (App. A-15). This is *not* the vagueness test set forth in *Hoffman*. As pointed out by the minority of the Virginia court, neither *Chapel* nor *Keiser* even involved due process vagueness challenges, and both predated *Hoffman*. (App. A-32). Rather, the laws invalidated in these cases involved challenges based on the Non-Delegation Doctrine.

In *Chapel v. Commonwealth of Virginia*, 197 Va. 406, 89 S.E.2d 337 (1955) an individual whose application for a dry cleaners license was denied received a fine for conducting business without a license. *Id.* at 407, 89 S.E2d at 338. The applicant challenged the Virginia statute which delegated the authority to issue business licenses to the State Dry Cleaners Board. *Id.* In that case, the Virginia Court inquired whether "the legislature has delegated to an administrative board the power to make rules and regulations without prescribing a standard or test to guide and control it in the exercise of such discretion." *Id.* at 410, 89 S.E.2d at 340. Resting its

decision primarily on the statute's delegation of authority, the Virginia Court reversed the fine and entered final judgment in favor of the applicant. *Id.* at 415, 89 S.E.2d at 343.

The Virginia Court also invalidated a statute based on the Non-Delegation Doctrine, rather than for unconstitutional vagueness, in *City of Waynesboro v. Keiser*, 213 Va. 229, 191 S.E.2d 196 (1972). In that case, a taxpayer challenged the amount of real property tax assessed by a city on certain parcels of land. *Id.* at 230, 191 S.E.2d at 196-97. The relevant statute provided that a taxpayer could obtain relief from a tax assessment by proving that the assessment exceeded the fair market value of the property or that the assessment was not uniform in application. *Id.* In part, the statute gave the reviewing circuit court judge the power to adjust the amount of the tax assessment "in its discretion." *Id.* The Virginia Supreme Court found that the statute was "vague and overbroad" in vesting discretionary powers with the courts. *Id.*

The Virginia Court's reliance on the Non-Delegation Doctrine in this case directly contradicts the holding in *Hoffman*. The rule annunciated by this Court in *Hoffman* is clear. The Court stated that a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." 455 U.S. at 495. In such cases, the statute will always be upheld. This rule focuses on the *challenger's conduct* proscribed by the statute.

The Non-Delegation Doctrine, however, involves an examination of the "guidelines" and "standards" given by the legislature in the act of delegation. *See, e.g., Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, the rule focuses on the principle guiding the discretion of the administering *official*. In this case, the Virginia Court replaced a *Hoffman*-style analysis, (an evaluation of the facts of the case and the actual conduct proscribed by the statute), with a hypothetical assessment of how the Commissioner could interpret the Statute. (*See* App. A-18 ("[T]he Commissioner's use of 'basic mathematics' is clearly not a standard that is prescribed by the language of the statute.")

The Virginia Court, in evaluating an as-applied due process challenge to the Statute using the Non-Delegation Doctrine, created a "hybrid" test for vagueness out of whole cloth. It is true that *Hill v. Colorado* announced that a statute may be unconstitutionally vague for affording too much discretion to an administrative official. *Hill*, 530 U.S. at 732. However, this analysis only applies if a party has engaged in conduct which is not clearly proscribed by the statute. *See Hoffman*, 455 U.S. at 495. As discussed above, the Statute clearly applied to Volkswagen's conduct in this case.

B. Even if A Non-Delegation Analysis Were Appropriate, the Statute Still Withstands a Vagueness Challenge.

Chapel and *Keiser*, from which the Virginia court derives its Non-Delegation principles, are not

even proper statements of the Non-Delegation Doctrine under federal law. The proper modern test for delegations of legislative authority is not whether "the legislature has delegated to an administrative board the power to make rules and regulations without prescribing a standard or test to guide and control it in the exercise of such discretion." *Chapel* at 410, 89 S.E.2d at 340. Rather it is whether the legislature has provided an "intelligible principle" behind the conferral of authority to an agency or administrator. *See, e.g., Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

Even if a Non-Delegation analysis were the appropriate inquiry, the Statute would still withstand judicial scrutiny. In making its determination that the Statute afforded too much administrative discretion, the Virginia court focused primarily on the Statute's use of the word "equitable." (App. A-15-18). This Court has held that the use of the term "equitable" may serve as an intelligible principle to guide a constitutional delegation of authority. *See, e.g., Yakus v. United States*, 321 U.S. 414, 426-27 (1944) (upholding delegation to price administrator to fix commodity prices that would be "fair and equitable"); *American Power & Light Co. v. S.E.C.*, 329 U.S. 90 105-06 (1946) (upholding delegation to SEC to prevent "unfair or inequitable" distribution of voting power among security holders). While the Virginia Court recognizes that the word "equitable" does not afford excessive discretion, it nevertheless invalidated the

Statute on the basis of its use of that word, in the absence of further "guidance."[5]

CONCLUSION

This Petition for Writ of Certiorari presents an important question of federal constitutional law. This Court should grant certiorari to address and clarify the proper method for courts reviewing statutes for vagueness. And, this Court should grant certiorari to reverse the Supreme Court of Virginia's contradiction of both this Court's jurisprudence and the Due Process Clause.

Respectfully submitted.

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[5] "[W]e agree with Volkswagen that, as applied by the Commissioner in this case, the requirement of ... a volume 'equitably related to the total new vehicle production or importation currently being achieved nationally' is impermissibly vague." (App. A 14).